Filed 8/20/19 Khersonsky v. Swingle CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OLEG KHERSONSKY, Plaintiff and Respondent, vs. DAVID JUSTIN SWINGLE, Defendant and Appellant.	B292919 (Los Angeles County Super. Ct. No. BC482075)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

David Justin Swingle, in pro. per., for Defendant and Appellant.

Alexander Polishuk for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant David Justin Swingle appeals from an order denying his motion to set aside the judgment against him and in favor of plaintiff and respondent Oleg Khersonsky. The parties' briefs on appeal indicate the judgment was entered after Swingle failed to appear at trial. Swingle contends the judgment violated the automatic stay provisions of the Bankruptcy Code, 11 United States Code section 362. We conclude Swingle failed to affirmatively demonstrate any error warranting reversal. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The appellate record consists of the trial court case summary (docket), Swingle's motion to set aside judgment, Khersonsky's opposition, the court's minute order, Swingle's notice of appeal, and Swingle's notice designating the record on appeal.

The docket reflects that Khersonsky filed a complaint on April 11, 2012, and judgment was entered on November 13, 2012. On July 16, 2018, Swingle filed a "Motion to Set Aside Judgment Pursuant to Plaintiff's Violation of Defendant's Stay of Bankruptcy." In response, Khersonsky filed an opposition arguing "[n]o evidence has been presented to support [Swingle's] claim to set aside the judgment . . . ." He further argued that his claims against Swingle arose after Swingle filed for bankruptcy and a bankruptcy stay generally does not extend to claims arising after the filing of a bankruptcy case.

The court denied the motion, stating "Defendant's motion is denied and denied 'with prejudice,' to the point that should Defendant, already designated and on the list as a vexatious

litigant, file the same motion . . . again the court will consider the availability of a remedy . . . of an order to show cause re contempt . . . and or sanctions . . . .” Swingle filed a timely notice of appeal.[1]

DISCUSSION

“Preliminarily, we stress that, to be successful on appeal, an appellant must be able to affirmatively demonstrate error on the record before the court.” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.) “‘“A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error . . . .”’” (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898.) Appellants acting in propria persona are held to the same standards as those represented by counsel. (See e.g., *Leslie v. Bd of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121.)

Swingle contends the trial court “failed to recognize the . . . automatic stay of bankruptcy . . . .” But the bulk of his motion to set aside the judgment concerned the merits of the allegations in Khersonsky’s complaint, not the alleged bankruptcy stay. The only portion of the motion addressing the claimed bankruptcy stay is a list of dates when: Khersonsky filed

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[1] We reject Khersonsky’s contention that the appeal is untimely. An order denying a motion to vacate is a separately appealable order. (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 135.) Swingle filed a notice of appeal from the August 7, 2018 order on September 26, within the 60-day deadline of rule 8.104(a) of the California Rules of Court.

his complaint, Swingle filed for bankruptcy, Swingle was served with the complaint, Swingle's bankruptcy petition was granted, and Khersonsky obtained a judgment. These dates are not supported by citations to a declaration or supporting evidence. And, even if the dates were supported by evidence, Swingle does not tie the dates to any substantive legal arguments supported by citations to legal authorities explaining why the dates require the judgment be set aside for violation of a bankruptcy stay.[2] Instead, on appeal, Swingle now points us to documents filed in his bankruptcy case, which are "a matter of public record." We decline Swingle's invitation to search for documents not presented to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444 fn. 3 ["Reviewing courts generally do not take judicial notice of evidence not presented to the trial court."].) We conclude Swingle failed to meet his burden on appeal to affirmatively demonstrate error.

[2] According to Swingle's motion, Khersonsky filed his complaint against Swingle for defamation approximately four months after Swingle filed for bankruptcy. But the automatic bankruptcy stay does not apply to post-bankruptcy events. (See 11 U.S.C. § 362(a)(1).)

DISPOSITION

The order denying Swingle's motion to set aside the judgment is affirmed. Khersonsky is awarded his costs on appeal.

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CURREY, J.

WE CONCUR:

WILLHITE, acting P. J.

COLLINS, J.